IN THE

Supreme Court of the United States

October Term, 1949

No. 513

513

WILLIAM A. LYON, Superintendent of Banks of the State of New York, as Liquidator of the business and property of Yokohama Specie Bank, Ltd., in the State of New York,

Petitioner,

against

BANQUE MELLIE IRAN.

No. 528

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Petitioner,

against

WILLIAM A. LYON, Superintendent of Banks of the State of New York, as Liquidator of the business and property of The Yokohama Specie Bank, Ltd., in the State of New York.

ON WRITS OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR BANQUE MELLIE IRAN.

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BRIEF FOR BANQUE MELLIE IRAN.

This brief deals with the questions presented by the granting of the two writs of certiorari on the petition of the Superintendent of Banks and the cross-petition of Banque Mellie Iran.

Opinions Below.

The opinion of the Supreme Court, County of New York, was reported in 188 Misc. 346 (R. 322); that of the Court of Appeals in 299 N. Y. 136 (R. 351), motion for reargument denied 300 N. Y. 459 (R. 364). No opinion was rendered by the Appellate Division, see 274 App. Div. 768 (R. 348).

Jurisdiction of This Court.

The jurisdiction of this Court is invoked under the Act of June 25, 1948, c. 646, 62 Stat. 929, 28 U. S. C. Section 1257 (Supp., 1949).

Questions Presented.

We do not agree with the statement of the question presented as it appears on page 2, subdivision 1, of the Superintendent's brief. The question originally presented on this review was described by the Court of Appeals in its remittitur as follows (R. 356):

> "A federal question was presented and necessarily passed upon by this Court, viz: it was held that the provisions of Executive Order No. 8389, as amended, and the rules and regulations issued pursuant thereto did not prevent the accrual or creation of the claim sued upon or render such claim void, but merely prevented the payment of the claim until an appropriate federal license is obtained, and that the documents in evidence do not constitute such a license."

It is now clear, however, that no federal question remains in this case, because on March 16, 1950 subsequent to the granting on February 20, 1950 of this writ of certiorari, the Department of Justice of the United States, Office of Alien Property, issued a license, which not only licenses the payment of the claim, but then proceeds to "license, an-

thorize and validate the transactions which form the basis of the claim". (A copy of this license it attached as an Appendix to this brief and also to the Superintendent's brief which this brief answers.)

Banque Mellie Iran accordingly filed a motion with this Court on March 24, 1950 to dismiss the writ of certiorari herein on the ground that the federal question presented by the petition has now been rendered moot and of no substance by reason of this license, and on the ground that no case or controversy now exists between the real parties in interest. This motion is now pending before this Court for decision, and we believe the decision of this motion will make it unnecessary for the Court to reach the question originally presented on this writ.

Statement.

Banque Mellie Iran has recovered a judgment in the Supreme Court, County of New York, of the State of New York to the effect that it has a preferred claim in the amount of $112,205.30 against the assets of The Yokohama Specie Bank, Ltd. in the State of New York, which assets are now in the hands of petitioner, the Superintendent of Banks of the State of New York, as Liquidator. The judgment expressly provides that payment of this claim is "subject to the provisions of Executive Order of the President of the United States No. 8389 as amended"—*i. e.*, subject to the issuance of a license (R. 9).

The validity of Banque Mellie's claim against The Yokohama Specie Bank, Ltd. has never been disputed. The sole question involved in the litigation has been whether Banque Mellie is entitled to a preference under the New York statute in the New York liquidation proceeding. The New York State Banking Law, Section 606-4a, provides that a claim against a "foreign banking corporation" in liquidation shall

be preferred against the New York assets of such corporation if it be one "arising out of transactions" had by the claimant with the New York Agency of such foreign banking corporation. The text of the statute, after authorizing the Superintendent to take possession of the business and property in this State of the foreign banking corporation under certain circumstances, read as follows:

> "After taking possession thereof the superintendent shall liquidate the business and property of any such foreign banking corporation in accordance with the provisions of this chapter applicable to the liquidation of banking organizations; *provided, however, that the claims of creditors of such corporation arising out of transactions had by them with its New York agency or agencies* or whose names appear as creditors on the books of such agency or agencies *shall be preferred against the assets of such corporation in this state* without prejudice to their right to share in the other assets of such corporation."* (Emphasis ours.)

All the New York courts which heard the case—that is to say, the Supreme Court Special Term, Appellate Division, First Department, and the Court of Appeals—have held unanimously that the respondent's claim answered the description required by the statute—namely, a claim "arising out of transactions" with the New York Agency.

These proceedings took place in the New York courts because, on the outbreak of war with Japan, the Superintendent as liquidator took over the New York assets of The Yokohama Specie Bank, Ltd. under the New York statute. The Alien Property Custodian chose not to vest these assets

* This section of the statute was amended by Chapter 63 of the Laws of 1946, approved February 28, 1946. The amendment specifically provided that it should not affect or vary any substantive rights heretofore accrued, and the Superintendent does not contend that it is applicable to Banque Melhe's claim.

in so far as they were required to satisfy claims entitled to a preference under the New York law [Vesting Order No. 915 (R. 201, 191)]. The Alien Property Custodian permitted the Superintendent to continue his liquidation and the administration of these assets [see Supervisory Order No. 27 (R. 198-200, 191); also letter dated September 28, 1942 (R. 242-244, 237-238)].

Synopsis of the Facts.

The facts underlying the Banque Mellie Iran claim may be briefly stated.

Banque Mellie Iran is the central bank of Iran. It is wholly owned by the Government of Iran. Iran was not an enemy during the war, but became an ally of the United States. Banque Mellie was never a blocked national.

In the first half of 1941, Banque Mellie Iran (through its correspondent in New York, Irving Trust Company) paid numerous sums aggregating $117,162.27 to the New York Agency of The Yokohama Specie Bank, Ltd. (R. 23). These sums were all paid to the New York Agency prior to July 26, 1941, the date on which the freezing order —Executive Order No. 8389—became applicable to Japanese assets. These sums were paid for the purpose of supporting certain credits opened simultaneously in Japan by Banque Mellie Iran (R. 24, 160-161). These credits were opened by cables from Teheran to the various branches of The Yokohama Specie Bank, Ltd. in Japan and were to be drawn upon by shippers in Japan who had sold goods to Iranian customers (R. 161).

These credits were to expire on a date fixed, "with the proviso that the unused balances were to be returned to plaintiff", as the Court of Appeals found (R. 351; 299 N. Y. 139, 142). When the original payments were made to the New York Agency, it was informed by Irving Trust Com-

pany which office of The Yokohama Specie Bank in Japan to notify (R. 25, 28-35). It did so notify that office (R. 40).

All these events took place before the "freeze".

With the exception of $1,000, none of these credits was utilized prior to their expiration dates. Thereafter, and subsequent to the "freeze" on July 26, 1941, the branches of The Yokohama Specie Bank in Japan sent a series of cables to the New York Agency instructing the latter to repay respondent certain of these sums, amounting in all to $112,205.30 (R. 142-155, 42), and the New York Agency of The Yokohama Specie Bank, Ltd. on or about December 2, 1941, notified Irving Trust Company, the representative of Banque Mellie Iran in New York, that it had been instructed to repay these sums provided a license from the Treasury Department should be procured (R. 36-37, 25-26). No further transactions took place, and no entries were even made on the books of the New York Agency as a result of this correspondence (R. 264). Because Japanese funds had by that time become frozen, payment could not be made without a license.

After the Superintendent of Banks had taken possession of the assets in New York of The Yokohama Specie Bank, Ltd., Banque Mellie Iran filed a claim with him asserting that its claim against The Yokohama Specie Bank, Ltd. was entitled to be preferred by reason of the fact that the statute gave preference to claims "arising out of transactions" with the New York Agency and that its claim arose out of such transactions (R. 245-249). The Superintendent of Banks rejected the claim and thereupon Banque Mellie instituted this litigation in the State of New York and, on motion for summary judgment, judgment was entered in favor of Banque Mellie to the effect that it was entitled to preferential payment out of these assets, the payment to be subject to the provisions of the Executive Order of the Presi-

dent of the United States No. 8389, as amended (R. 9). The Court of Appeals affirmed the judgment to that effect.

After the Superintendent of Banks had taken over these assets on December 8, 1941, the Treasury Department, and subsequently the Alien Property Custodian, permitted him to continue the liquidation of the New York Agency of The Yokohama Specie Bank, Ltd. and to pay claims which he found to be preferred under the New York statute (R. 201, 191). The Secretary of the Treasury and the Alien Property Custodian issued certain authorizations to the Superintendent of Banks, which Banque Mellie claimed in the Court of Appeals constituted general licenses which would have authorized the payment of the Banque Mellie claim if it should be held to be a preferred claim (R. 196-197, 192-193). The Court of Appeals held that these documents did not constitute authorizations to permit the payment of Banque Mellie's claim.

An application which the Irving Trust Company, on behalf of Banque Mellie Iran, filed in December, 1941 with the Treasury Department for a specific license authorizing the payment of these claims was not denied (R. 283-286, 262). Instead, the Irving Trust Company was notified under date of January 21, 1942, by the Federal authorities that no action was being taken, with the comment that

> "The liquidation of the Yokohama Specie Bank, Ltd. is under the supervision of the Superintendent of Banks" (R. 287, 262).

Since the writ of certiorari was granted, the Department of Justice, Office of Alien Property, in response to a further application, issued on March 16, 1950 the specific license above described and set forth in the Appendix, which not only licenses the payment of the claim, but which also licenses, authorizes and validates the transactions which form the basis of the claim.

The Relation of This Case to *Lyons* v. *Singer*.

The Superintendent of Banks, on page 11 of his brief, asserts that the federal question presented by this case is identical with that presented in the case of *Lyons* v. *Singer*, and for argument refers to his brief in the *Singer* case filed concurrently with his brief herein.

Although the *Singer* case and the case at bar have certain features in common which the Court of Appeals held entitled both claims to a preferential status, the case at bar contains certain very significant features not present in the *Singer* case.

The first of these features is that the appropriate licensing authority of the United States Government has now not only licensed the payment of the claim, but also authorized and validated the transactions which form the basis of the claim. No such license has been issued to the claimant in the *Singer* case, but in fact, as appears from the brief of the Superintendent in the *Singer* case (at p. 33), such a license has been refused.

Secondly, this case is distinguished from the *Singer* case because the underlying transactions by which The Yokohama Specie Bank, Ltd. became indebted to the Banque Mellie Iran took place through dealings with the New York Agency here in New York *before* the "freeze". When Banque Mellie deposited these monies in New York in the first half of 1941 (R. 24, 160), there arose the obligation on the part of The Yokohama Specie Bank, Ltd., as the Court of Appeals has found, to refund them in case the credits which were to be opened were unutilized. No obligation of The Yokohoma Specie Bank, Ltd. arose or existed until these monies were deposited in New York (R. 27, 256). The fundamental obligation of The Yokohama Specie Bank, Ltd. with respect to these payments thus arose as a result

of this transaction with the New York Agency before the freeze. It was the underlying event in the "course of dealings" which constituted, as the Court of Appeals decided, a transaction between the Banque Mellie Iran and the New York Agency within the terms of the New York statute entitling the claim to preferential payment subject only to the procuring of an appropriate license.

ARGUMENT.

POINT I.

The licensing and validating of the transactions which form the basis of the claim have rendered the federal question presented by the Superintendent moot and without substance and there is now no case or controversy which merits the consideration of this Court.

It seems necessary to call the Court's attention to this point in this brief, although it is already before the Court on motion filed on March 24, 1950. It is unfair to ask this Court to consider the questions raised by the writ of certiorari granted by reason of the Superintendent's petition without reference to the subsequent license issued by the Office of Alien Property.

The Superintendent contends that the question presented on this review is whether the Court of Appeals, in holding that Banque Mellie's claim was entitled to a preference, relied on any transactions with the New York Agency which were prohibited by the Executive Order in the absence of a license. We do not concede that the Court of Appeals relied on any such prohibited transaction and refer the Court instead to the question as defined by the Court of Appeals in its remittitur (p. 2, *supra*).

In any event the license which has since been issued completely eliminates any such issue from the case. The document on which we base this statement not only authorizes the payment of this claim, but undertakes to "license, authorize and validate the transactions which form the basis of the claim of Banque Mellie Iran". We quote from the document as follows:

> "I hereby license, authorize and validate the transactions which form the basis of the claim of Banque Mellie Iran in the above-entitled action, and, accordingly, also authorize your firm, as attorneys for Banque Mellie Iran, to receive and the Superintendent of Banks to pay the sum of $112,205.30 from the assets of The Yokohama Specie Bank, Ltd. in the possession of the Superintendent of Banks of the State of New York, as liquidator of the business and property in the State of New York of The Yokohama Specie Bank, Ltd. Authority is also granted to the Superintendent of Banks to make the necessary entries on the books of the bank to reflect the transactions and the payment authorized by this license." (Appendix to this brief.)

The specific authority for validating and authorizing a transaction after it has taken place is to be found in General Ruling of the Treasury Department No. 12, April 21, 1942, 7 F. R. 2991, subdivision (3), as follows:

> "(3) Unless otherwise provided, an appropriate license or other authorization issued by the Secretary of the Treasury before, during, or after a transfer shall validate such transfer or render it enforceable to the same extent as it would be valid or enforceable but for the provisions of section 5(b) of the Trading with the Enemy Act, as amended, and Order, regulations, instructions and rulings issued thereunder."

In a press release issued April 21, 1942, the Treasury Department explained the nature of General Ruling No. 12 and referred to this paragraph as follows:

> "Paragraph (3) of the ruling provides that a license issued by the Treasury Department, either before or after a transfer, completely validates the transfer for the purposes of freezing control. Of course, if an assignment would have been invalid without freezing control (e. g., because not properly executed), a Treasury license does not purport to remedy this type of invalidity." (Press Release No. 34, April 21, 1942. Reprinted in "Documents Pertaining to Foreign Funds Control", U. S. Treasury Department 1946, p. 71.)

General Ruling No. 12 was issued by the Secretary of the Treasury by virtue of Executive Order No. 8389. The authority to issue licenses was transferred to the Attorney General from the Secretary of the Treasury by Executive Order No. 9989, August 20, 1948, 13 F. R. 4891, which continued in force the provisions of General Ruling No. 12 above quoted, except that the licensing authority was made the Department of Justice, Office of Alien Property, instead of the Secretary of the Treasury (8 C. F. R. 505.1 [1949]).

Again, General Ruling No. 4, subdivision (18), September 3, 1943, 8 F. R. 12285, recognizes the power of the licensing authority to authorize and validate prior transactions if the authorization specifically so provides. General Ruling No. 4 reads as follows:

> "(18) No license or other authorization issued by or under the direction of the Secretary of the Treasury pursuant to the Order or sections 3(a) or 5(b) of the Trading with the Enemy Act, as amended, shall be deemed to authorize or validate any trans-

action effected prior to the issuance thereof, *unless such license or other authorization specifically so provides.*" (Emphasis ours.)

The transactions which the Court of Appeals held entitled Banque Mellie-Iran's claim to a preferential status under the New York statute were the following: The original deposit of the monies in New York with the New York Agency; the notification by the home offices in Japan to the New York Agency of the amount of the unutilized credits; and the notification by the New York Agency to the Irving Trust Company that it had received instructions to make the refund provided it was authorized by the Treasury Department to do so (R. 351-352, 36-37). It was this "course of dealings" which the Court held entitled the claim to a preference under the New York statute (R. 353).

If there could conceivably be any taint of illegality in any of these acts, or if the Executive Order is to be construed as forbidding any legal consequences arising therefrom, this license removes all taint of illegality both from the acts or from any legal consequences which would ordinarily result.

The intention of the United States Government to make this license retroactive is as plain as words can make it. There can be no dispute about this. The power of the licensing authority to issue a retroactive license is also clear.

There is one further consideration which makes the Superintendent's determination to prosecute this appeal incomprehensible. This is the fact that there is no longer any real case or controversy in this Court because the real parties in interest accede to the allowance of the payment of the claim. The monies here in dispute can go only either to Banque Mellie Iran, or to the Office of Alien Property. It is conceded that the Superintendent has in his possession

ample assets to pay all preferred claims, including Banque Mellie Iran's claim, in full with interest. There are no other preferred creditors, therefore, whose interests the Superintendent is under a duty to protect who can be in any way affected. If this claim be denied a preference under the New York statute, the monies which would otherwise go to pay it would vest in the Office of Alien Property because the Alien Property Custodian in his Vesting Order of February 25, 1943, vested all assets of The Yokohama Specie Bank, Ltd. in New York which were in excess of the amount required to pay claims of creditors preferred under the New York statute (R. 201, 191). The Office of Alien Property and the Banque Mellie Iran are, therefore, the only parties in interest, and that Office has now issued a license authorizing the payment of the claims in full and authorizing and validating the very transactions on which the claims are based. There is no controversy between the Office of Alien Property and Banque Mellie. Both want the claim paid.

From the foregoing it would appear that the Superintendent of Banks has no interest except that of a stakeholder and is not now presenting to this Court a real case or controversy, and the writ should be dismissed.

POINT II.

The Court of Appeals, in holding that the transactions with the New York Agency entitled Banque Mellie Iran's claim to a preference under the New York statute did not fail to give effect to the Executive Order.

This point need only be considered by the Court in the event that the motion to dismiss the writ is denied.

We would first point out that the federal question presented, as defined by the Superintendent, is not the same

as the one defined by the Court of Appeals in its remittitur. The question presented as defined by the Superintendent in his brief, at page 2, is as follows:

> "1. Does Executive Order No. 8389, as amended, and the rules and regulations issued pursuant thereto, prevent the accrual or creation of a claim *based upon a prohibited transaction* and render it void, or do they merely prevent payment until an appropriate federal license is obtained?". (Emphasis ours.)

The remittitur of the Court of Appeals does not contain the words italicized above—namely, "based upon a prohibited transaction". The fact was that the Superintendent in his motion to amend the remittitur requested the Court of Appeals to use this language, but the Court expressly omitted these words and instead defined the federal question as follows:

> "A federal question was presented and necessarily passed upon by this Court, viz: it was held that the provisions of Executive Order No. 8389, as amended, and the rules and regulations issued pursuant thereto did not prevent the accrual or creation of the claim sued upon or render such claim void, but merely prevented the payment of the claim until an appropriate federal license is obtained, and that the documents in evidence do not constitute such a license" (R. 356).

It seems clear that the Court of Appeals was right in refusing to state that its holding that Banque Mellie Iran was entitled to a preference was in any way "based on a prohibited transaction". The transactions with the New York Agency which the Court of Appeals relied upon as entitling Banque Mellie to a preference were, as we have heretofore stated, the original deposit of the monies in New York with the New York Agency before the freeze;

the notification by the home offices in Japan to the New York Agency of the amounts of the unutilized credits; and the notification by the New York Agency to the Irving Trust Company that it had received instructions to make the refund provided it was authorized by the Treasury Department to do so (R. 351-352, 36-37). These transactions constituted the course of dealings which the Court of Appeals referred to as follows:

> "Underlying plaintiff's claim for that amount was a course of dealings which culminated in the advice by the Agency that it was in funds which it was obligated to pay to plaintiff" (R. 353).

The very genesis of this claim thus arose as a result of a transaction with the New York Agency in New York before the Executive Order became in any way effective in respect to Japan or Japanese funds. This transaction consisted in the deposit of these monies with the New York Agency with, in the words of the Court of Appeals, the "proviso that the unused balances were to be returned to plaintiff" (R. 351). This was certainly not a prohibited transaction. The whole underlying basis for Banque Mellie's claim is merely for the refund of these monies which The Yokohama Specie Bank, Ltd. became obligated, at the moment they were deposited, to account for either by paying them out when drafts were presented or by returning them in case the credit expired before they were withdrawn.

Nor was there anything in the Executive Order which forbade the Japanese branches from notifying the New York Agency after the freeze that the credits had expired and instructing it to return the monies if a license could be procured (see cables, R. 142-155, 42). In the same way, there is nothing in the Executive Order to forbid the New

York Agency to inform the respondent through the Irving Trust Company that the monies would be paid "provided we are authorized by the Treasury to do so" (R. 36-37, 25). The very fact that the New York Agency stated in so many words that it would repay the monies only provided it was authorized by the Treasury to do so negatived all possibility of a violation of the Executive Order.

The Superintendent argues that the Executive Order forbids a transfer of credit; but these transactions resulted in no transfer of credit. At most they constituted an expression of intention to transfer credit in case it should be permitted by the Treasury to do so. Nothing was done after the freeze other than these notifications. It is undisputed that no credit was ever received or accepted by the New York Agency from the Japanese offices with respect to the instructions that were sent from Japan; that no entries were made on any book of the New York Agency; that the telegraphic instructions were revocable; and that at no time were any monies earmarked for the payment of this claim. These facts all appear in affidavits submitted by the Superintendent himself, both in the case at bar and in the *Singer* case (see affidavit of Frank Kearns in the case at bar, R. 263-264, Record in first *Singer* case, pp. 51-52).

The events after the freeze amounted to nothing more than a routine acknowledgment of a debt which was created before the freeze took effect, and a statement of a willingness to pay when permitted by a Treasury license to do so. It is difficult to see how such a transaction was in any way prohibited by the Executive Order or in any way contravened the policy of the Trading with the Enemy Act or any orders or regulations issued pursuant thereto.

The Superintendent will urge that the Court of Appeals' holding involved a decision that a new obligation of the New

York Agency regarded as a separate entity was created after the freeze. We respectfully urge that that was not the real *ratio decidendi* of the Court's decision. In the first place, there is nothing in the statute which requires that there shall be an obligation of the New York Agency regarded as a separate entity, but merely that the obligation shall be that of the "foreign corporation" arising out of transactions with the New York Agency. Secondly, the record shows that there was no new consideration upon which a new debt of the New York Agency could be predicated. Thirdly, while it is true that the Court of Appeals in a part of its opinion in the first *Singer* case talked about an obligation of the Agency (293 N. Y. 542, 549-550), the real *ratio decidendi* of the Court's decision we believe will be found in the last paragraph of its opinion in the first *Singer* case (p. 550). From that paragraph it is clear that it bases its decision on the "course of dealing" rather than any new obligation in the sense of a debt created by the New York Agency after the freeze.

In that paragraph the Court of Appeals said:

> "Our conclusion is that the course of dealing which culminated in the advice to Standard by Yokohama Specie's New York Agency, given in accord with instructions from its home office in Japan, was a *transaction* had by a creditor (Standard) of a foreign corporation (Yokohama Specie) 'with its New York Agency,' within the provisions of section 606, subdivision 4, paragraph (a) of the Banking Law."

It will be noted first, that the Court states this as its "conclusion"—that is to say, the ultimate rationale of its decision. The two points which it stresses are first, that the "course of dealing" was the "transaction" with the New York Agency, and second, that it was a transaction had by

a creditor of a "foreign corporation". (Yokohama Specie Bank). All this is very significant, and shows that this Court gave to the statute its simple and literal interpretation. Nothing is said in this connection of any requirement that claimant shall be a creditor of the New York Agency regarded as a separate entity or about "an enforceable obligation against the New York Agency". Nothing is said even about a promise to pay by the New York Agency. On the contrary, the Court points out that the creditor must simply be a "creditor of a foreign corporation", as the statute provides. It then holds that the "course of dealing" had by that creditor of the foreign corporation with the New York Agency was a sufficient transaction with the New York Agency to bring claims within the terms of the statute.

The fact that the Superintendent found it necessary to go to the Legislature of the State of New York in January, 1946 to secure an amendment to Section 606, subdivision 4, of the Banking Law to bring about his separate entity theory indicates that the statute previous to that time had no such meaning. Chap. 65, Laws of the State of New York, 1946, approved February 28, 1946 (R. 316-318). Fifteen sessions of the Legislature have passed since Section 606, subdivision 4(a) of the Banking Law was enacted. Under these circumstances, the amendment passed in 1946 is not to be taken as confirming any previous meaning, but as changing the law. *People, etc.* v. *Davenport*, 91 N. Y. 574, 592. This amendment is concededly not retroactive.

The Case of *Propper* v. *Clark*.

The Superintendent argues that the decision of the Court of Appeals is in conflict with the decision of this Court in the case of *Propper* v. *Clark*, 337 U. S. 472 (1949).

The *Propper* case is readily distinguishable from the case at bar. In that case, this Court held that after the freeze

under the Trading with the Enemy Act title to property frozen cannot be passed without a license to a State Receiver on his appointment by a State Court. In that case, the New York State Court, in its order appointing the permanent Receiver, actually directed the *transfer* of the claim to the Receiver. This Court in its opinion at least twice pointed this out (337 U. S. 472 at 479, 480). We thus have an affirmative act forbidden by the Executive Order, attempted to be done after the freeze, and this Court held that the mere fact that it was done by a New York Court did not make it legal when higher authority had forbidden such an act. It is abundantly clear from the opinion that this Court in that case was concerned only with the unlicensed passing of title to property which already had been blocked, whether the person who assumed to pass the title was the individual owner or a State Court. The Court took pains to point out that the decision was limited to this narrow question. Mr. Justice REED said at page 486:

> "We do not now undertake to say whether every determination of rights concerning blocked property in unlicensed litigation is voidable. We base our determination on the purpose of Congress to prevent shifts in title to blocked assets and the prohibition of the Executive Order against transfers of such a credit as this."

In the *Propper* case, the power of the Alien Property Custodian to vest the assets involved depended on whether the Receiver had acquired title. In that case, the prohibition against payment without a license which exists in this case did not itself protect the interests of the Federal Government, as this Court pointed out (pp. 482, 484). In the case at bar, however, no question of title is involved. The decision of the Court of Appeals had no effect on the power of the Alien Property Custodian to vest these assets if he had chosen to do so.

The Superintendent seeks to inject the question of title by arguing that when the Superintendent takes possession of the business and property of a banking organization for the purposes of liquidation the assets become a trust fund for the benefit of creditors and that thereafter the creditors possess some sort of right *in rem* to these assets (see p. 27, Superintendent's brief in the *Singer* case). The answer to this argument is that all of the transactions which the Court of Appeals relied on as entitling this claim to a preference took place prior to December 8, 1942, the date when the Superintendent took possession of the assets for the purposes of liquidation.

The Superintendent in his brief in the *Singer* case, page 29, points to a sentence in the opinion of this Court in the *Propper* case as indicating that this Court understood that a question of title was involved in the *Singer* case and that this Court disagreed with the Court of Appeals' disposition of that question. The sentence in this Court's opinion in the *Propper* case to which he refers is as follows:

> "We assume that the Court of Appeals of New York held in Singer v. Yokohama Specie Bank that title to blocked assets could pass without a license from a statutory receiver to a creditor" (p. 484).

We believe that this Court, with the record of the *Singer* case now before it, will recognize that the decision of the Court of Appeals in that case did not involve a holding that "title to blocked assets could pass without a license" from the Superintendent of Banks to a creditor. No such holding was involved in the *Singer* case or in the case at bar. The Court of Appeals in the first *Singer* case, as in the second, merely held that in interpreting the New York statute the transactions involved fulfill the requirements of the New York statute and entitle the claims to a preferential pay-

ment when a Federal license should be procured. The Court of Appeals in the *Singer* case did not hold that title to any property had been transferr from the Superintendent or put out of reach of the Alien Property Custodian or of any other Federal authority acting under the Trading with the Enemy Act. The decision of the Court of Appeals did not involve any decision affecting title which would have prevented the Alien Property Custodian from vesting any of the assets involved if he had elected to do so. This is made doubly clear by the Court of Appeals' holding that any payment of this claim remains subject to a license from Federal authority.

In support of its interpretation of the holding of the *Singer* case, this Court cited in a footnote (at p. 484) the following language of the Court of Appeals in its opinion in the *Singer* case:

> "The fact that Federal regulations governing transactions in foreign exchange prevent the payment to Standard until a license under Executive Order No. 8389, as amended, is procured does not make conditional the obligation of the New York Agency to pay. (See United States Treasury Department, General Rule No. 12(4) under Executive Order No. 8389 as amended; also *Feuchtwanger* v. *Central Hanover Bank*, 288 N. Y. 342.)"

Not having the full record in the *Singer* case before it in the *Propper* case, this Court apparently understood the above quoted language to mean that title to blocked assets was passed from the Superintendent to the plaintiff. In fact, however, the quoted language was not addressed to the effect which Executive Order No. 8389 had on title to any claim or property. It was merely addressed to the Superintendent's argument that the claim was a contingent claim and therefore not provable under the New York statute.

The Superintendent had pleaded as an affirmative defense in his answer to the *Singer* case that, because of the licensing requirements, the claim of plaintiff was uncertain and contingent and therefore not a provable claim (Singer, R. 21). The Court of Appeals answered this conclusion in its above-quoted language. Its holding was simply that the existence of the license requirement as to payment did not make the claim contingent in the sense that it would be unprovable in the liquidation proceeding. The Court's language was not intended to imply that any title or interest could in fact be transferred without a license.

The Superintendent cites certain cases in the lower Federal courts. None of these cases involves questions similar to the one presented here.

It is submitted that the decision of the Court of Appeals in the case at bar in so far as it recognizes the validity of Banque Mellie's claim as to principal is not in conflict with any decision of this Court and gave full and proper recognition to the effect of applicable Federal statutes and Executive Orders.

POINT III.

The question raised by Banque Mellie Iran's cross-petition.

The cross-petition of Banque Mellie Iran is concerned with the denial by the Court of Appeals of interest on its claim.

The Court of Appeals denied all interest on the ground that in the absence of a license to pay the claim no interest could run.

Banque Mellie Iran claimed, as did the plaintiff in the *Singer* case, that certain general licenses issued in 1942,

first by the Secretary of the Treasury and later by the Alien Property Custodian, authorized the payment of its claim. The Appellate Division held that the license of October 29, 1942 did include the permission to pay Banque Mellie Iran's claim (R. 192-193, 190). The Court of Appeals reversed the Appellate Division on this point. The cross-petition covers only the question of the effect of these general licenses.

The effect of these general licenses will be fully argued in the *Singer* case, which on this point is substantially identical with the case at bar. We do not wish to burden the Court with duplication of this argument. If the Court should grant Singer's cross-petition and reverse the Court of Appeals as to the matter of interest, then obviously a similar treatment must be accorded to Banque Mellie Iran's cross-petition. In the event, however, that this Court should agree with the Court of Appeals and hold that a special license was necessary to pay these claims, it follows that Banque Mellie Iran would not be entitled to interest until the receipt of such special license on March 16, 1950.

Respectfully submitted,

ALLEN T. KLOTS,
Attorney for Banque Mellie Iran.

PETER H. KAMINER,
MERRELL E. CLARK, JR.,
Of Counsel.

APPENDIX.

In reply, please refer
to file number

MSM:DGM:ekl
F-39-177

DEPARTMENT OF JUSTICE
Office of Alien Property
Washington 25, D. C.

MAR 16 1950

Winthrop, Stimson, Putnam & Roberts, Esqs.
40 Wall Street
New York 5, New York

Attention: Allen T. Klots, Esq.

Re: Application on behalf of Banque Mellie Iran for a license under the ~~Trading~~ with the Enemy Act, as amended.

Gentlemen:

Reference is made to the application dated May 3, 1949, for a license or authorization under the Trading with the Enemy Act, as amended, filed by your firm on behalf of Banque Mellie Iran to permit payment of the sum of $112,205.30 to your firm as attorneys for Banque Mellie Iran, pursuant to a judgment of the Court of Appeals in the action entitled *Banque Mellie Iran* v. *The Yokohama Specie Bank, Ltd., and Elliott V. Bell, etc.* Reference is made also to our letter of January 24, 1950 advising that a license for payment will not be granted unless this Office is prepared to license the underlying transactions. At a conference between Mr. Allen T. Klots of your firm and members of my staff, Mr. Klots stated that the application previously filed might be deemed amended to include an application for a license of the underlying transactions.

After due consideration of facts and arguments presented in the foregoing application, the discussion which took place at the conference with Mr. Klots, the memorandum and other documents submitted by you, together with the facts and the law as developed in the above-entitled litigation, and pursuant to authority under the Trading with the Enemy Act, as amended (50 U. S. C. App. 1-39), Executive Order No. 8389, as amended, (3 CFR, 1943 Cum. Supp.), Executive Order No. 9095, as amended, (3 CFR, 1943 Cum. Supp. and 3 CFR, 1945 Supp.), delegated to me by Executive Order No. 9788 (3 CFR, 1946 Supp.), Executive Order No. 9989, (3 CFR, 1948 Supp.), Paragraph I (b) (1) of Statement of Organization and Delegation of Final Authority, 13 F. R. 9605, and pursuant to the Rules of Office of Alien Property, Department of Justice (8 CFR 505.1):

I hereby license, authorize and validate the transactions which form the basis of the claim of Banque Mellie Iran in the above-entitled action, and, accordingly, also authorize your firm, as attorneys for Banque Mellie Iran, to receive and the Superintendent of Banks to pay the sum of $112,205.30 from the assets of The Yokohama Specie Bank, Ltd. in the possession of the Superintendent of Banks of the State of New York, as liquidator of the business and property in the State of New York of The Yokohama Specie Bank, Ltd. Authority is also granted to the Superintendent of Banks to make the necessary entries on the books of the bank to reflect the transactions and the payment authorized by this license.

Sincerely yours,

(Signed) HAROLD I. BAYNTON

Harold I. Baynton
Acting Director
Office of Alien Property
Department of Justice

cc: Edward Feldman, Esq.